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No. 06-415

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN SELIG in his official capacity as Director of the ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; RAY HANLEY in his individual capacity as former Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; and ROY JEFFUS, in his individual capacity and his official capacity as Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioners,

vs.

PEDIATRIC SPECIALTY CARE, INC.; CHILD AND YOUTH PEDIATRIC DAY CLINICS, INC.; FAMILY COUNSELING AND DIAGNOSTIC CLINIC; TOMORROW'S CHILD LEARNING CENTER LLC; D AND D FAMILY ENTERPRISES, INC.; JAMES SWINDLE and STACEY SWINDLE as parents and next best friends of JACOB and NOAH SWINDLE, minors; SUSANN CRESPINO, as parent and next best friend of MICHAEL CRESPINO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. THIS COURT SHOULD CONSIDER *OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS V. FOGARTY* IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

The Arkansas Department of Health and Human Services, Ray Hanley in his individual capacity, and Roy Jeffus in his individual capacity and his official capacity as Director of the Division of Medical Services of the Department of Health and Human Services (state defendants), submit for this Court's consideration the decision of the Tenth Circuit Court of Appeals in *Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty*, __F.3d__, 2007 WL 10760 (10th Cir. Jan. 3, 2007) pursuant to Sup. Ct. R. 15(8). There are three reasons for reviewing the *Fogarty* decision in the context of the state defendants' pending Petition for Writ of Certiorari.

First, the Tenth Circuit ruled that 42 U.S.C. § 1396a(a)(30)(A)[1] does not create privately enforceable rights under 42 U.S.C. § 1983. The Tenth Circuit thereby joins the First, Sixth and Ninth Circuit Courts of Appeal on this issue. The Eighth Circuit continues to stand alone.

Second, the *Fogarty* opinion concerns Medicaid services to persons under age 21, commonly referred to as Early and Periodic Diagnosis, Screening, and Treatment ("EPSDT") services. EPSDT services are referenced at 42

[1] This section provides in pertinent part that a State plan for medical assistance must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans . . .) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care."

U.S.C. § 1396d(a)(4)(b) and defined at 42 U.S.C. § 1396d(r). It is critical that *Fogarty* involved EPSDT services because the respondents argue that (1) 42 U.S.C. § 1396a(a)(30)(A) is not controlling, and (2) the EPSDT definitions of Section 1396d create a private right of action under Section 1983. Faced with similar arguments, *Fogarty* relied on Section 1396a(a)(30)(A) to analyze a private cause of action based upon EPSDT services instead of the definitions of EPSDT services found in Sections 1396d(a)(4)(b) and (r).

As *Fogarty* points out, EPSDT is defined as: (1) Periodic screenings (not at issue in this case); and (2) "Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." Subsection 1396d(a) defines the medical assistance that states are authorized to reimburse under state Medicaid plans. As a condition of Medicaid coverage, Child Health Management Services ("CHMS") must fit one of these definitions. The only definition of medical assistance applicable to CHMS is in subsection (a)(13): "[O]ther diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services . . . recommended by a physician . . . within the scope of their practice for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level[.]"

CHMS fits this definition because CHMS services are recommended by physicians for the maximum reduction of physical or mental disability. (A service delivery model that proposed to put a band-aid on a broken arm would not

qualify under the definition of medical assistance set out in subsection (a)(13) because the treatment would not be for the maximum reduction of the disability stemming from the broken arm.) CHMS therefore meets the threshold test of qualifying as medical assistance, and in turn fits within the EPSDT definition. Accordingly, Arkansas Medicaid reimburses medically necessary CHMS care furnished to Medicaid eligible persons under age 21.

The sole purpose of medical assistance definitions such as Section 1396d(a)(13) is to determine whether state Medicaid programs are authorized to cover particular care. Respondents wrongly assert that the definition in subsection (a)(13) is a floor for the quantity of services to be provided, when this definition actually is a limitation on the type of care defined as medical assistance. *See* Respondents' Brief in Opposition to Writ of Certiorari (respondents assert a "federal right to EPSDT services in an amount [six hours] that will result in the maximum reduction of physical and mental disability").

The *Fogarty* Court understandably did not identify any such right flowing from the definitions of medical assistance and EPSDT in Section 1396d. As used in subsection (a)(13), "maximum" modifies the word "reduction" and sets the goal of the treatment plan. It does not refer to the quantity of services necessary to carry out a particular CHMS treatment plan for a particular child, nor does it refer to the speed with which the treatment goal must be reached.

The quantity of CHMS medical assistance that is medically necessary for a particular eligible child is a medical judgment. This brings the real issue into focus: how much CHMS treatment is medically necessary for

each eligible child? The respondents' disagreement with the medical necessity judgments of board-certified pediatricians is a utilization question that must be resolved under 42 U.S.C. § 1396a(a)(30)(A) using the dispute resolution procedures set out in 42 U.S.C. § 1396a(3). The *Fogarty* opinion recognizes that this is the issue and holds that Section 1396a(a)(30)(A) creates no privately enforceable rights, resolving the private enforcement question in favor of the state defendants.

Third, and specific only to the history of this case, the Tenth Circuit ruled that the District Court erred when it ordered the State Medicaid Agency to conduct a study of rates, costs, and services to determine if its rates were adequate. By contrast the Eighth Circuit ruled that 42 U.S.C. § 1396a(a)(30)(A) requires such studies not only in connection with rates, but also as a condition precedent to Medicaid state plan amendments having nothing to do with payment rates. *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services*, 364 F.3d 925, 929-30 (8th Cir. 2004).

II. CONCLUSION

The *Fogarty* decision is important precedent because: (1) it reinforces the other circuit courts of appeals decisions that conclude there is no private right of action under 42 U.S.C. § 1396a(a)(30)(A); (2) it considers and implicitly rejects arguments that the definitions of medical assistance, which include EPSDT, at 42 U.S.C. § 1396d create private rights of action; and (3) it holds it was error for the district court to order a State Medicaid Agency to conduct

a study of rates, costs, and services to determine if its rates were adequate.

Respectfully submitted,

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